United Nations AT/DEC/1148

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1148

Case No. 1249: MALEH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President; Ms. Brigitte Stern;

Whereas, on 8 February 2002 Ayman Maleh, a former staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

> "II: ***Pleas***
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> ...
>
> The Applicant requests full compensation for the duration of the project. He is requesting the repatriation grant and compensation for the injury to his professional reputation ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 July 2002 and once thereafter until 31 October 2002;

Whereas the Respondent filed his Answer on 31 October 2002;

Whereas, on 23 January 2003, the Applicant filed Written Observations amending his pleas as follows:

> " ... the Applicant requests the Tribunal to find in his favour and to grant him the appropriate compensation to which he is entitled of three years net base pay, in light of the exceptional circumstances of the case."

Whereas the facts in the case are as follows:

On 30 July 1995, the Applicant accepted an offer of a one-year intermediate-term Project Personnel Appointment (200 series), as a Civil Engineer (Materials) at the L-4 level, with the Department for Development Support and Management Services (DDSMS). The Applicant was assigned to a highway and transport development project in Riyadh, Saudi Arabia, with 30 October 1995 his effective date of entry on duty.

On 29 October 1995, the Resident Co-ordinator in Riyadh informed Natural Resources & Environment Planning and Management Branch (NREPMB) that the Saudi Ministry of Communications did not wish to recruit the Applicant as an international expert, but rather as a United Nations Volunteer (UNV). He further stated that there seemed to be much confusion regarding the post against which the Applicant was to be recruited and that, unfortunately, he was only made aware of this problem the previous afternoon. He added that the Applicant should be informed "urgently *prior to his departure*, that he should *postpone his arrival* in Saudi Arabia *until further notice*". On 30 October, DDSMS unsuccessfully attempted to contact the Applicant in this regard.

On 31 October 1995, DDSMS wrote to the Resident Co-ordinator in Riyadh, reminding him that, on 17 June 1995, DDSMS was officially informed of the Applicant's selection by the Saudi Ministry of Communications, following which, in July, the Applicant's contract with the United Nations was established; the Resident Co-ordinator was also informed that the Applicant was on his way to Riyadh.

On 1 November 1995, the Applicant arrived in Riyadh and was informed by the Resident Co-ordinator that there had been a "misunderstanding" between the Organization and the Saudi Authorities and that the Saudi Government had not approved the appointment of an international expert. On 6 November, the Resident Co-ordinator wrote to the Officer-in-Charge (OiC), NREPMB, updating on the events concerning the Applicant's case and requesting, inter alia, a "conditional authorization" to provide the Applicant with a one-way ticket to New York.

On 5 December 1995, a letter of appointment was prepared, indicating that the Applicant's appointment was for one year, at the L-4 level, effective 30 October 1995, for service with the Highway and Transport Development, Management and Maintenance in Riyadh, Saudi Arabia.

On 20 December 1995, the OIC, NREPMB, informed DDSMS that the Saudi Government had confirmed that the Applicant's post was no longer needed and that

NREPMB concurred with this position. He requested assistance with cancellation of the Applicant's contract and earliest repatriation and added that, at present, there were no alternative positions available for an expert with the Applicant's expertise. On the same day, the Applicant was informed that DDSMS and the Saudi Government had agreed to repatriate him immediately to New York and that he should contact DDSMS after the Christmas holiday. Subsequently, the Applicant returned to New York.

On 2 February 1996, the Applicant was informed that, since the Saudi Authorities had confirmed their request that his post be cancelled, his appointment would be terminated. On 17 March, the Applicant indicated that he was "able and willing to accept any transfer under the terms of the contract" which he had been holding.

On 24 April 1996, the Assistant Secretary-General, Office for Human Resources Management (OHRM), informed the Applicant that the Secretary-General had decided to terminate his appointment effective 30 April 1996. He indicated that his letter constituted a "formal notice of termination of [the Applicant's] appointment in accordance with Staff Rule 209.4 (a)" and that "the Secretary-General has decided to grant you termination indemnity equivalent to one week salary for each month of uncompleted service through 29 October 1996", as well as one-month's salary in lieu of notice.

On 8 May 1996, the Applicant requested the Assistant Secretary-General, OHRM, to reconsider the decision to terminate his contract, and further requested that he be assigned to another post, at least until the expiration date of his contract. He indicated that he had "abandoned so much in order to respond to an invitation from the [United Nations] to accept employment that carried with it, he was assured, excellent prospects of extension".

On 11 August 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 30 October 2001. Its considerations, conclusions and recommendations read, in part, as follows:

> "***Consideration***
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> ...
>
> 26. The Panel observed that ... the decision to terminate the Appellant's appointment was taken in conformity with the Staff Rule 209.2 (d) inasmuch as the post to which he had been appointed was abolished, and the Respondent could not find another post suitable for his specialised qualifications. In the Panel's view, the Saudi Government's objection to the Appellant's appointment had created such a crippling effect on the Respondent's ability to honour the Appellant's contract, as to constitute a

reasonable ground for the termination of his appointment. The Panel nevertheless ... observed that there had been mishandling of the Appellant's appointment ...

...

30. ... the Panel found that the Administration mishandled the Appellant's case in a number of ways, aborting the contract term, bringing the Appellant to the duty station in spite of the by then known government objections to his appointment, issuing a one-year letter of appointment months after it became clear that the Appellant would not perform the functions for which he was to be recruited and in taking an additional four months to terminate his appointment. The Panel also noted with dismay the length of time (5 years) allowed to elapse in an effort at conciliation.

31. The Panel believed that the Administration had shown a lack of good faith in the handling of the Appellant's case, and had taken too long to resolve the uncertainties surrounding the Appellant's appointment.

Conclusions and Recommendations

32. ... the Panel concluded that the decision to separate the Appellant from service for abolition of post was taken in accordance with the Staff Rules and Regulations. The Panel found that the Respondent mishandled the Appellant's case in ways that resulted in tangible injury to the Appellant. The Panel therefore unanimously recommended that the Appellant be paid as compensation a sum equivalent to six months of his net base salary, (representing the balance of his contract) minus any termination indemnity he may have received."

On 9 January 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General observes that the termination of your appointment resulted from reasons beyond the Organization's control and, accordingly, does not agree with the finding that the Administration mishandled your case because the contract term was aborted. Similarly, it is not clear on what basis the Board found that the Administration mishandled your case when it brought you to the duty station, as the record indicates that you were already on your way to Saudi Arabia when DDSMS was first informed of the uncertainties surrounding your appointment. Furthermore, the fact that it took four months to terminate your appointment did not result in material injury to you, as you continued being paid a salary during those four months. However, the Secretary-General acknowledges the uncertainty that you may have experienced during that time, and he also accepts the Board's finding concerning the belated issuance of the letter of appointment. He has therefore decided to compensate you in the amount of three months net base salary at the rate in effect at the time of your separation from service, minus the termination indemnity that you have received. ..."

On 8 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent is in breach of his contract with the Applicant.

2. The Resident Co-ordinator knew or should have known of the problem and should have notified Headquarters long before the Applicant's retention in service and departure for Saudi Arabia; it remains unexplained how he could have instructed DDSMS to proceed with the recruitment of an international expert without having secured the Saudi Government's approval of the post, if that was a requirement.

3. The Applicant gave up a career position based on the Respondent's offer, which although was initially for one year, its terms as reflected in the job description and confirmed in the recruitment interviews, indicated an expected duration of the project for four years.

4. The Applicant was kept in service until 30 April 1996, which although portrayed as a benefit to him, actually prevented him from making alternative plans while in a state of uncertainty over his future.

5. The JAB unduly delayed the Applicant's appeal for over five years.

Whereas the Respondent's principal contentions are:

1. The Applicant's termination constitutes a proper exercise of the Respondent's authority. The early termination of the Applicant's appointment did not violate the Staff Regulations and Rules.

2. The Administration learned that the Applicant's post was "abolished" by the Saudi Authorities *after* the Applicant left for Saudi Arabia.

3. The Applicant suffered no tangible injury because he was paid during the delay in termination.

4. The Administration offered the Applicant sufficient compensation for the uncertainty he may have experienced and the belated issuance of the letter of appointment.

5. The Applicant has offered no legal basis for compensation for the duration of the project. The Applicant has not offered any evidence of alleged injury to his professional reputation, thus there is no basis for compensation for such injury.

6. The Applicant is not entitled to a repatriation grant under the applicable rules.

The Tribunal, having deliberated from 27 October to 17 November 2003, now pronounces the following Judgement:

I. The Tribunal is satisfied that the Applicant suffered a very upsetting and deeply frustrating experience as a consequence of the events which gave rise to these proceedings.

II. In July 1995, the Applicant was recruited by the Organization to serve on an intermediate term (200 series) contract as a Civil Engineer/Materials in Saudi Arabia for a period of one year, to commence on 30 October 1995.

The Applicant departed from the United States on 30 October 1995, having made extensive arrangements and commitments and having resigned from a position he held with an engineering consultancy firm in New York, on the basis that he would be working in Saudi Arabia for a minimum of the next twelve months, with verbal indications of good prospects for a four year assignment. On his arrival in Riyadh on 1 November, he reported for work, only to be informed that he could not take up duty because of a 'misunderstanding' which had arisen between the Saudi Arabian Authorities and the Organization. It appears from the record that the problem had arisen as a result of a disagreement between the Saudi Arabian Ministries of Foreign Affairs and of Communications as to the status upon which the Applicant was to be retained: whilst there was a willingness to accept him as a United Nations volunteer, the Saudi Arabian Authorities were not willing to have him as an international expert, being the status upon which he had been recruited by the Organization. The record also indicates that the Saudi Arabian Authorities had not communicated to the Organization their objection until shortly before the Applicant was to depart from his home in the USA to travel to Riyadh, making it difficult to contact him in a timely manner so as to inform him of the difficulties and to postpone his journey. It appears that attempts had been made to contact the Applicant at his home and through his wife at her office but that they were unsuccessful.

III. The Applicant has submitted and the JAB has found that the Organization mishandled his case in a number of ways, including the proposition that he had been brought out to Saudi Arabia in spite of the then known Saudi Arabian objection to his appointment. The Tribunal can find no evidence to support this finding. The evidence indicates to the contrary. Whilst the record shows that similar problems had arisen in the past and that other candidates had been rejected on like grounds, it seems

clear that the objection of the Saudi Arabian Authorities or the differences in their belief as to the status on which the Applicant had been recruited, were not made known to the Organization until it was too late to contact the Applicant before his departure, despite efforts made to do so.

Whilst it may well be that the Organization should have acted with greater care, so as to have confirmed in advance that there was no problem or misunderstanding regarding the Applicant's status and acceptability, this is a very different criticism than the one found by the JAB, which was that the Organization had actively brought the Applicant out to Riyadh despite having actual knowledge as to the problem.

IV. Between 1 November, when the Applicant arrived in Riyadh and 24 December 1995, when he was repatriated to the USA, various inquiries and approaches were made by the Organization to the Saudi Arabian Authorities to see if the issue might be resolved or if some other solution could be agreed. This culminated with an offer made to the Applicant to take up work with the status of a volunteer and a later offer, to work as a national professional, rather than as an international expert. Each offer was clearly far less advantageous to the Applicant, as it would have carried a considerable reduction in remuneration and he would not have had the status or privileges of a staff member. The Applicant acted within his rights in declining to accept these offers and in the circumstances, when no suitable way could be found to retain the Applicant in Saudi Arabia in conditions acceptable to him, he was duly repatriated.

V. In early February 1996, the Applicant was informed that the Saudi Arabian Authorities had confirmed their request that the post for which he had been recruited be cancelled. It appears that by this time, the project for which the Applicant was recruited had either been cancelled or postponed.

The Applicant was accordingly advised that the Organization was in the circumstances "compelled to proceed with an arrangement for the termination of his appointment". The Applicant argues that what in effect took place was an unwarranted interference by the Saudi Arabian Authorities in the affairs of the Organization, such as is prohibited by Article 100 of the Charter, which prevents the Organization from seeking or receiving instructions from any Government or from any other authority external to the Organization. The Tribunal rejects this submission. The Tribunal accepts the JAB's findings that "the Saudi Government's objection to

the [Applicant's] appointment had created such a crippling effect on the Respondent's ability to honour the [Applicant's] appointment as to constitute a reasonable ground for the termination of his appointment". In the circumstances, the Tribunal shares the JAB's conclusion that the Applicant's appointment was terminated in conformity with staff rule 209.2(d) in so much as the post to which he had been appointed was abolished and the Respondent could not find another post suitable for the Applicant's specialised qualifications.

On 24 April 1996, the Applicant was formally notified that the Respondent had decided to terminate his appointment effective 30 April 1996, and that this notification constituted formal notice of termination of his appointment in "accordance with staff rule 209.4(a)". The Applicant was also informed that he would be granted termination indemnity equivalent to one week's salary for each month of uncompleted service through 29 October 1996, in accordance with Annex III (b) of the Staff Regulations, and one month's salary in lieu of notice, in accordance with staff rule 209.4(b).

VI. In due course the Applicant submitted an appeal to the JAB, contesting the decision to terminate his contract. The Presiding Officer of the JAB decided that it was appropriate to refer the matter for conciliation in accordance with staff rule 111.2(b). This attempted conciliation was unsuccessful but caused a five-year delay in the resumption of the hearing of the Applicant's appeal before the JAB. The Applicant maintains that all that occurred during the five-year period was the holding of two fruitless and futile meetings, during which the Respondent's representatives insisted that they were not authorised to negotiate. Whether or why, it appears that this delay was again wholly unjustified and the conciliation process ought to have ascertained, within a reasonable time, if there were real prospects of a negotiated settlement, and in the absence of such prospects, the process should have been concluded without more ado.

VI. The JAB made additional findings that there had been mishandling of the Applicant's appointment and ultimate separation for reasons which it specified in its report. It concluded that the Administration had shown a lack of good faith in the handling of the Applicant's case and that it had taken too long to resolve the uncertainties surrounding the Applicant's appointment. Save for the JAB's finding that the Organization had brought the Applicant out to Saudi Arabia after it had known the Saudi Arabian Authorities' objection to his appointment, the Tribunal

considers that, based on the facts, the JAB was entitled to reach its other conclusions. Since there was sufficient evidence to justify these conclusions, the Tribunal is bound by them for the reasons stated in Judgement No. 1009, *Makil* (2001):

> "... the Tribunal will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations. The Tribunal stresses that the above principles are applicable to findings of primary facts and have no bearing on the question of interpretation of documents or the drawing of inferences from primary facts. Such inferences may often be described as findings of secondary facts rather than findings of primary facts. This is because the Tribunal is in no way disadvantaged when compared to a preliminary fact finding body, be it a JDC, JAB or other such body in matters of that nature, whereas such body is usually best suited to making findings of primary facts, as it has seen and heard the witnesses. The Tribunal also emphasizes that it of course enjoys the power conferred by the Statute to embark on fact finding in appropriate cases. For instance, it enjoys the power to have oral hearings, albeit it exercises this power infrequently."

VII. In light of its findings, the JAB had recommended payment to the Applicant of six months net base salary (minus the termination indemnity which had been paid) as compensation for the matters of which he had complained which had been upheld in its proceedings. The Tribunal finds that this does not amount to appropriate compensation commensurate with the Applicant's injury, even having rejected the JAB's finding that the Applicant had been brought to Saudi Arabia after the Organization knew of the Saudi Arabian objection to his appointment.

The Applicant cites Judgement No. 767, *Nawabi* (1996) as relevant to his case. The Tribunal notes that the present case is dissimilar to *Nawabi* on a number of determining issues. In *Nawabi*, the Respondent requested the Applicant's employer to expedite his release despite knowing that the post which the Applicant was to encumber was being abolished; the Applicant's family had already joined him in Damascus; and other mishandling of the Applicant by the Organization took place. In the present case, the Applicant departed for Riyadh shortly after the Saudi Arabian objection to his employment became known, making it extremely difficult to notify him of this prior to his departure and, his family had not yet departed the USA.

Having differentiated between the two cases, the Tribunal is nevertheless convinced that the compensation awarded to the Applicant should be increased to better compensate for the injuries he sustained. In particular, the Tribunal considered the fact that the Applicant left a position to take up employment with the United Nations, based on a one-year contract and verbal indications of good prospects for a four year assignment.

The Tribunal also considers that the Respondent should have taken better care to ensure the Saudi Arabian Authorities' agreement to the recruitment of the Applicant, especially since difficulties regarding this issue had been previously encountered. Had proper and timely care been given to this issue, there should have been ample time to inform the Applicant of the situation and to avoid his unnecessary travel to Riyadh. The Tribunal considers that the Respondent was negligent in this regard.

In this context, the Tribunal wishes to point out, as did the JAB in *Nawabi*, that

> "[a]ny potential recruit to the United Nations hearing the facts of this case would indeed be foolish to accept a fixed-term appointment with the Organization. If steps are not taken to rectify such situations - instead of attempting to defend and justify them, the United Nations may one day find that it can no longer recruit and retain competent professionals."

VIII. In determining the amount of compensation, the Tribunal also considered the exceptionally long delay in adjudicating the Applicant's case before the JAB. Whilst the Tribunal commends attempts at conciliation, there could be no doubt that these should have been completed, one way or the other, much earlier. The Tribunal takes this opportunity to reiterate its position, as recently stated in Judgement No. 1067, *Ou* (2002):

> "... the Tribunal commends the efforts made to reach an agreed resolution of this dispute by way of conciliation. It is the Tribunal's view that the notion of conciliation between the parties is to be encouraged. However, any conciliation process has to be negotiated and carried out in good faith."

IX. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded compensation in the amount equivalent to six months net base salary at the rate in effect on the date of this Judgement, in addition to the compensation already paid to him;

2. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Brigitte **Stern**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary